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In the
Supreme Court of the United States

OCTOBER TERM, 1941

No. 354

GEORGE E. MORTON, Trustee, and
CITY NATIONAL BANK, Trustee
and Individually ..... PETITIONERS

vs.

DARDANELLE SPECIAL SCHOOL DISTRICT NO. 15, YELL COUNTY,
ARKANSAS ..... RESPONDENT

PETITION FOR REHEARING

As a preface to the reasons supporting a rehearing and granting of the writ we wish to make the following suggestion:

In cases involving the impairment of contracts by state legislative action this Court determines for itself whether there is a contract and whether said contract has been impaired. In *Tidal Oil Co. vs. Flannagan*, 263 U. S., 444, this Court says:

> "There is another class of cases relied on to maintain this writ of error. They are those in which this Court has held that, in determining whether a state law has impaired a contract, it must decide for itself whether there was a contract, and whether the law, as enforced by the State Court, impairs it."

Hence any decision by the Supreme Court of Arkansas that the bond contract was not impaired is not binding upon this Court. Therefore since the undisputed evidence shows that under the Horne case and because of the power given to the electors after these bonds were sold it is clear that the bonds will never be paid. It is therefore a duty resting upon this Court to grant the writ of certiorari to prevent the confiscation of petitioners' property in the bonds.

This Court in a leading case on the subject makes it clear that this Court is bound to take jurisdiction of cases involving the confiscation of property. The Constitutional obligation resting upon this Court in a case of this kind is illustrated by the decision of this Court in the case of *Cohen vs. Virginia*, 6 Wheat., 404; 5 L. E., 291.

Therefore when there is presented to this Court a plain violation of petitioners' rights under said contract clause and under the Fourteenth Amendment we respectfully urge that an obligation rests upon this Court to protect petitioners' rights under said Constitution and to prevent the Legislature of a State from annulling said clause by legislative action. The judicial power vested in this Court owes a duty to the people of the United States to protect the destruction of said Constitution as against legislative acts which impair contracts.

Therefore, come now the above-named George E. Morton, Trustee, and City National Bank, Trustee, and individually, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

I

BASIC ERRORS IN THE OPINION OF THE COURT OF APPEALS OF THE EIGHTH CIRCUIT

This effort to have this Court review the decision of the Court of Appeals of the Eighth Circuit presents a most unusual situation for determination by this Court.

1. The Court of Appeals, as shown by its opinion elsewhere cited, bases its decision in the instant case upon the case of *Women's Catholic Order of Foresters vs. Spe-*

cial School District of North Little Rock, 105 Fed. (2d), 716. An examination of that case by this Court will demonstrate that error. The questions involved here were not at all involved in that case. The Court of Appeals in that case, showing that that case does not apply to the instant case, said:

> "The instant case involves a construction of the statutes of Arkansas as applied to Arkansas contracts. The jurisdiction of the Federal Court was invoked on the ground of diversity of citizenship, and there was no allegation or claim that either of the legislative acts involved nor the Constitution of Arkansas impaired the obligation of the contract, in violation of the restraints of the Federal Constitution."

The denial of this petition for a rehearing and the denial of the petition for writ of certiorari would be an affirmance of the opinion in the instant case based upon a prior opinion of said Court of Appeals, which does not decide any question in this case.

2. Another error in the opinion of the Court of Appeals, as respondent construes that opinion, is that said Court in the instant case denied the writ of certiorari on the decision of this Court in *Erie Railroad Co. vs. Tompkins*, 304 U. S., 64. We prove below that that too is an error. We show below that the decision of this Court in the Erie case is an authority showing that the Court of Appeals was bound to accept the decisions of the Supreme Court of Arkansas as to the powers of the board of directors in the Schmutz and Trumann cases, elsewhere discussed.

3. We have quoted below from the Schmutz case and from the brief of respondent in this Court in the instant case what is said about "later decisions" of the Arkansas Court. We have contended in our briefs, and do now contend, that the only "later decisions" are those in the Horne and Pledger cases. The respondent does not anywhere, as we understand its brief, contend that these later decisions are not based upon Act 169 of 1931 and Act 28 of 1933. It follows therefore that the "later decisions" are the decisions based upon said Acts of 1931 and 1933. There is no denial, as we understand respondent's

brief, that these Acts repealing all the laws governing the issue of these bonds and authorizing the electors to defeat payment, are in conflict with the law as it stood at the time of the issuance and delivery of these bonds. It is clear from the Acts themselves that said Acts 169 and 28 give powers to the electors which powers did not exist in the electors prior to those Acts, and therefore it seems to us certain that said Acts are in conflict with the rights of the petitioners in this case. The respondent does not, as we believe, anywhere deny the existence of such conflict between said Acts and the laws existing at the time of the issuance of these bonds.

We have mentioned this subject below and there is probably some repetition, but we deem it essential to clarification to make this suggestion here.

4. As hereinafter shown, the Court of Appeals erred in holding that there was no enforceable contract.

II

THE ACTS OF THE GENERAL ASSEMBLY OF ARKANSAS, BEING ACT 169 OF 1931 (ACTS 1931, PAGE 476) AND ACT 28 OF THE EXTRAORDINARY SESSION OF 1933 (ACTS 1933, PAGE 88), AS A MATTER OF LAW, IMPAIR THE OBLIGATIONS OF THE CONTRACT IN THE BONDS IN CONTROVERSY, SAID OBLIGATIONS BEING TO PROVIDE FOR REPAYMENT AND TO REPAY THE BORROWED MONEY.

It is the petitioners' contention that the obligation to repay the borrowed money is the principal and most substantial obligation in said contract in said bonds. If that obligation is impaired by the said Acts of the Legislature of Arkansas, then said Acts, under the established rule of law always in force in this Court, are void as applied to said obligation. Section 10 of Article I of the Constitution of the United States prohibits any State from passing any law impairing the obligation of contracts.

The Court of Appeals in its opinion on the instant case (*Morton, Trustee, et al. vs. Dardanelle Special School District*, 121 Fed. (2d), 423) declares in substance

that under the laws of Arkansas in existence at the time of the issuance of these bonds, there was no power in the board of directors to pledge the revenues for the repayment of the money borrowed. It is our contention that that declaration of law by that Court is clearly erroneous and unsupported by the decisions and statutes of Arkansas, as well as by the decisions of this Court. The bonds (R. 10, 36) assert on their face that the revenues derived from all sources are pledged to secure the payment of the bonds. The deed of trust contains recitals (R. 9, 35) showing the amount of the building fund which is set apart for use in payment of the interest and the bonds as they fall due each year. There are two bond issues involved: One was issued in 1926 and the other in 1931. The first was in the amount of $55,000.00 and the second in the amount of $105,000.00. The first issue bears interest at the rate of 5 per cent. per annum and the second issue bears interest at the rate of 5½ per cent. per annum. The bonds fall due serially and cover the period from their date to the year 1951. The district at the time of the issuance of the second bonds was indebted for past due indebtedness for constructing buildings in a sum approximating $35,000.00. The second bonds were issued to raise funds to pay that debt and, also, to construct a high school building. The said district had recently been increased from a small district to a very large one, being something like twenty-four miles in length and from six to nine miles in width, and covering the very fertile valley of the Arkansas river, and including the town of Dardanelle and a number of villages.

A taxpayer's suit was brought alleging that the bonds were illegal and void. As to the first issue, the validity was determined by the District Court without delay. As to the second issue, their validity was not finally determined until June 28, 1938 (see final decree, findings of fact and conclusions of law, R. 60-80).

The petitioners further contend that even if there was no power in the board of directors to pledge the revenues from whatever source derived, still the Acts of the Arkansas Legislature numbered 169 of 1931 and 28 of 1933 are

void as against these bond issues, for the reason that said Acts as construed by the Supreme Court of Arkansas impair the obligation of said contract.

III

THE STATUTES ABOVE REFERRED TO OF 1931 AND 1933, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS IN THE CASE OF *HORNE VS. PARAGOULD SPECIAL SCHOOL DISTRICT*, 186 ARK., 1000, 57 S. W. (2d) 568, AND ALSO IN THE CASE OF *PLEDGER VS. CUTTRELL*, 189 ARK. 562, 74 S. W. (2d) 646, IMPAIR THE OBLIGATION OF THE CONTRACT IN THE BOND.

The Court of Appeals denied this contention apparently on the ground that there was no enforceable contract in the bond. That declaration referred specifically to the lack of power, as that Court held, in the directors to pledge the revenues. It is our contention that the statutes authorizing the issuance of the bonds, being Act 248 of 1905 (Acts 1905, page 651), and Act 25 of 1913 (Acts 1913, page 115), and Act 160 of 1917 (Acts 1917, page 857), themselves pledged the revenues of special school districts from whatever source derived as security to repay the borrowed money. We contend that the Supreme Court of Arkansas in the case of *Schmutz vs. Special School District of Little Rock*, 78 Ark. 1118, 95 S. W. 438, declared and held that the Acts authorizing the issuance of these bonds as a matter of law pledged the revenues from whatever source derived. We respectfully submit that the respondent in its brief so admits on page 9. In said brief on this subject appears this language of the Supreme Court of Arkansas in the Schmutz case:

> " * * * The Act under which the bonds were issued provides that the evidence of indebtedness issued by the district shall be 'paid out of the building fund in the order of their date, as the building fund is provided and collected by successive levies.' This, in effect, pledges the building fund of the district, whatever that may be, to the payment of the bonds. Besides, as the bonds are valid obligations, it was evidently the intention of the Legislature that they

> should be paid out of the revenues of the district, and they are therefore a charge against such revenues as any other valid debts would be. * * * "

However, the respondent after quoting that language attempts to change its meaning by suggesting later decisions, and uses this language:

> "This seemed to carry the power to pledge revenue, but if we examine the wording in the light of later decisions it is not as positive as it first appears to be. We note, upon re-examination, the phrase 'This, in effect, pledges the building fund of the district, whatever that may be, to the payment of the bonds.' The opinion did not say that the directors could pledge the revenues of the district but that the statute in effect pledged the building fund, and the Court expressly states that there is uncertainty as to what a building fund may be."

After the decision of the Supreme Court of Arkansas in the Schmutz case, substantially every special school district in Arkansas began the issuance of bonds pledging the revenues and income from whatever source derived. Said bond issues, as we show in our brief on petition for certiorari, exceed twenty-three million dollars (our brief, p. 24). Respondent attempted to weaken our suggestion in that respect by contending that the great majority of these bonds had been refunded. That suggestion does not change the law nor the meaning of the decision in the Schmutz case. It is our contention that the Horne case is a suggestion to the voters in the special school districts of Arkansas of a method by which said voters may compel the refunding of bonds at a great loss to the bond owners. We believe that the honest voters of the State would vote an eighteen-mill tax, even though the whole of it was needed for a brief period to pay the debts as well as to operate the schools.

If the above statement from the brief of respondent is not sufficient to prove an admission by the respondent that the Acts authorizing the bonds themselves pledged the revenues, we still insist that the decisions of the Arkansas Supreme Court in the Schmutz case and, also, in the case of *American Exchange Trust Co. vs. Trumann*

Special School District, 183 Ark. 1041, 40 S. W. (2d) 770, do establish the contention that the board of directors had undoubted power to pledge the revenues. They had that power for the reason that the Schmutz and Trumann cases established the principle that the *statute* pledged the revenues from whatever source derived. If we are correct in that contention, then it would follow that the Court of Appeals was in error in saying that there was no power in the board of directors to pledge the revenues. Since the statute itself pledges the revenues, undoubtedly the power existed in the board of directors to comply with the requirements of the statute, and therefore they had the power under the statute to pledge the revenues as the statute itself did.

In our opinion, the above contentions have not been answered by the respondent and are not answered at all by the decision of the Court of Appeals. If the Court of Appeals is in error as to the power of the board of directors to pledge the revenues, it would follow as a matter of law that the petition for rehearing should be granted, and the petition for writ of certiorari should be granted, because of the errors of the Court of Appeals.

But the respondent attempts to contend that the Schmutz case, in view of later decisions, did not mean to say that the statutes themselves pledged the revenues. See our suggestion on this subject, supra. In truth, there is an unanswerable reason which shows that the statutes themselves did pledge the revenues. That reason is that the special school district had no means of paying these bonds except from its revenues derived from many different sources. But respondent attempts to cast doubt upon the decision in the Schmutz case by urging that the Court was in doubt as to what the building fund was. It is clearly shown in the Acts themselves that the building fund is nothing but a sinking fund. It is nothing but a fund to repay. It can be raised only under the statutes of Arkansas by a levy and collection of taxes. That principle is established on the very face of said Acts themselves.

The expression in the Schmutz case that the building fund, "whatever that may be," is pledged to the payment of the bonds, instead of narrowing the meaning of the

statutes, broadens it. When Justice Riddick used the language, *whatever the building fund may be*, he had in mind the sources from which the building fund came. The sources were the poll tax, the severance taxes, the tobacco tax, and several other sources found in the statutes, including the eighteen-mill tax. The meaning of Judge Riddick, therefore, was that from whatever source the building fund, or sinking fund, or repayment fund came, it was a fund for repayment and was pledged by the Acts themselves as a repayment fund.

Respondent makes another untenable contention for the purpose of supporting the decision of the Court of Appeals, which contention is to the effect that the case of *Erie Railroad Co. vs. Tompkins*, 304 U. S., 64, is the basis of the ruling of the Court of Appeals of the Eighth Circuit. The Erie railroad case, instead of supporting that contention, in our opinion absolutely denies it.

It is contended by respondent that the Federal Courts are bound by the decisions of State Courts on all questions of general law. As to the exact meaning we refer the Court to this Court's opinion in the Erie Railroad case. Now the respondent by the language above quoted, as we contend, admits that the statutes themselves pledge the revenues; and if that is true, the board of directors were given ample power to pledge them, and therefore the Court of Appeals was bound by that decision, and under the authority of the Erie Railroad case said Court of Appeals did not have the power to announce a view antagonistic to the view expressed in the Schmutz and Trumann cases.

But respondent further contends that the decisions in the Horne and Pledger cases are merely changes of the rules of law in Arkansas. That, too, is an untenable position. The changes made, as indicated by the respondent in the language above quoted, are the changes due to Acts 169 of 1931 and 28 of 1933. That is plainly shown in the Horne case for the reason that the Court was thus construing the result of votes as to millage as found in Act 169. In the Pledger case, which is based on the Horne case, as well as on the statute, it is made clearer that the decisions in those two cases are based upon Acts 169 and

28. Therefore, the contention of respondent on that subject is refuted by the decision of this Court in the case of *Tidal Oil Co. vs. Flannagan*, 263 U. S., 444. In that case this Court in an opinion by Chief Justice Taft pointed out that the impairment of the contract was caused by the statutes and not by the judgment of the Court construing the statues. The construction of the statute given by the State Court, except in cases where impairment of contracts are involved, may be accepted by the Federal Courts.

IV

OTHER STATUTES SHOWING THAT THE BOARD OF DIRECTORS HAD ABSOLUTE POWER TO MANAGE AND CONTROL THE SCHOOLS, WHICH INCLUDES THE POWER TO RAISE FUNDS BY PLEDGING THE REVENUES FROM WHATEVER SOURCE DERIVED.

Section 4 of Article XIV of the Constitution of the State of Arkansas (Pope's Digest, page 147), being that part of the Constitution providing for public schools as the "safeguards of liberty and the bulwark of a free and good government," authorizes and requires the Legislature of the State to invest in and confide to certain officers the management, control and operation of the public schools. The Legislature obeyed that section of the Constitution by requiring the electors to elect six directors in all the special school districts of the State. That was first enacted in Act 13 of 1869. We printed that Act in an appendix to our brief on petition for certiorari. The Legislature selected the directors as the officers authorized to administer the school laws and operate the schools. No power under that Article of the Constitution, or any other Article, or under any Act, was given to the electors to exercise any control over the management and operation of the schools. They had the power to vote for or against taxes, but no other power. It is essential that the management and control of schools should be vested in and confided to some officers. The Acts authorizing the issuance of these bonds heretofore referred to are embodied in Sections 8977, 8978 and 9010 of Crawford & Moses' Digest of the statutes of Arkansas, 1921.

The Supreme Court of Arkansas upheld the broad and far-reaching powers of the board of directors in the case of *Pertuis vs. Williams,* 137 Ark. 425, 208 S. W. 789. Construing its own laws and Constitution in that case the Court said:

> "Article 14 of the Constitution of 1874 provides for a suitable and efficient system of public schools. Section 4 provides that the supervision of the public schools, and the execution of the laws regulating the same, shall be vested in and confided to such officers as may be provided for by the General Assembly. Pursuant to this Article of the Constitution, our General Assembly has provided for a comprehensive system of public schools and has confided the management and regulations of the same to a board of directors."

When the bonds were issued, the words in Act 248, as amended, "under such conditions and regulations as to time, amount, rate of interest and manner of payment as the board of school directors of said school district shall prescribe," excluded any possible power in a voter, and imposed the entire management upon said directors. No officer other than the directors had any power in making a contract for the issuance and sale of the district bonds. By that language "the manner of payment" was confided wholly to said board of directors. The sole power of allocating the taxes, the proceeds of the eighteen mills, was vested exclusively in the directors. It was the duty of said board to say how many of the eighteen mills shall be used to pay the bonded debt, and how many, if any, for the operation of the schools. The said board has refused to discharge that plain duty, and hence it may be enjoined. The manner of payment, which said board must determine, includes the source from which the payment must come or is to be made. The manner of payment includes the means of payment. *In re Mona,* 16 Utah 100, 50 Pac. 810; *City of Erie vs. Caulkins,* 85 Pa. 247, 27 Am. Rep. 642. The use of the word *payment* is significant. The mortgage is *security,* not *payment.* A payment cannot be made with the real property. A payment can be made only with cash or liquid funds. Payment does not mean *security* for the debt.

From these Arkansas statutes and decisions, we must respectfully urge that the power of allocation of the taxes as well as all other income of the special school district, is lodged solely and alone with the board of directors. Until the decision in the Horne case, which was based upon Act 169, and referred to taxes which had been voted under that Act, there is not a scintilla of law showing that the electors have any power over the issuance of bonds. It is, in our opinion, a truism in law that when one set of officers are given the power to issue bonds by a municipality, no set of voters has the power to impair the contract made by the directors. We therefore respectfully urge that the statutes of Arkansas authorizing these bonds themselves pledged the revenues and that the Supreme Court of Arkansas so held, and if we are mistaken in that, then the above statutes and decisions make it plain that the directors are given power to pledge the revenues, and therefore the Court of Appeals was clearly in error in holding that the board of directors were without power to pledge said revenues.

We have discussed above the question of the validity of the pledging of the revenues by the directors. In conclusion on that subject we respectfully suggest that if this bond issue has two obligations, such as the pledging of the revenues and the providing of a sinking fund, or building fund, or repayment fund, an impairment of one of those obligations by Acts 169 and 28, heretofore referred to, requires the reversal of this case even though the board of directors had no power to pledge the revenues. The obligation of the contract of a general creditor cannot be impaired any more than the contract of a secured creditor.

V

ERROR OF COURT OF APPEALS AS TO WARRANTS AND BONDS PAYABLE IN FUTURE

The evidence of indebtedness described in Act 248 of 1905, being the law under which these bonds were issued, covers notes, bonds and warrants. These evidences are payable in future under the express terms of Act 248, and the directors are expressly required to pledge the reve-

nues. Sections 1 and 2 of said Act plainly authorize the directors, if the evidences are payable in the future, to pledge the revenues. In other words, Act 248, as amended, if the evidences require present or immediate payment, does not require pledging of the revenues. Pledging of the revenues is necessary only when payment is in the future. An order to pay made by the directors, or a warrant for immediate payment made by them, needs no pledge of revenues. On the other hand, a bond, warrant or other evidence of indebtedness payable in future, does need for security a pledge of the revenues. The order or warrant for immediate payment assumes that there is cash in the treasury to pay the sum named in said warrant or order. The provision in the statute declaring that warrants are valid even if there is no money in the treasury to pay the same, refers only to warrants payable in the future. Therefore the warrant payable in the future is in legal effect and meaning the same as a bond. This reasoning proves that under said statutes, as well as under the general policy empowering school districts to borrow money, it was necessary to make provision at the time of issuing the bonds for the payment thereof. Hence, authority to make such provisions necessarily granted the power to make same. Under said statute, as amended, it is in effect plainly enacted that every evidence payable in future must carry a pledge to repay. The building fund which is created under the statute is a fund raised by the levy and collection of taxes. Hence the building fund is in reason and legal effect a repayment fund. This was so decided by the late District Judge John E. Martineau by the orders which he made in this case. He actually set aside the building fund by requiring the directors and officers to set aside revenues for said fund. See Act 25 of 1913, page 115. See Act 160 of 1917, page 857.

VI

REASONS FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

In petitioners' petition for the allowance of the writ of certiorari (see pages 8-9), among others, two reasons are assigned for the granting of the writ: One is that the

decision of the Court of Appeals of the Eighth Circuit is in conflict with the decisions of this Court. The other is that said decision of the Court of Appeals in the instant case is in conflict with other decisions of the Court of Appeals. We think the authorities cited below establish these two propositions clearly and effectively.

VII

WE MOST RESPECTFULLY URGE THAT THE UNDISPUTED FACTS IN THIS RECORD ESTABLISH BEYOND DOUBT THE IMPAIRMENT OF THE CONTRACT OF REPAYMENT EMBODIED IN THE BONDS.

When the claim is made that a statute of a state impairs the obligation of a contract, this Court determines for itself whether there is a contract and whether that contract is impaired. *Tidal Oil Co. vs. Flannagan, supra.*

We desire first to cite the decisions of this Court establishing the impairment of said contract by Acts 169 and 28 above referred to. We refer to the following decisions of this Court:

In *Green vs. Biddle,* 8 Wheat. 84 (opinion by Justice Story) it was said:

> "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

In *Planters' Bank vs. Sharp,* 6 Howard, 327, it was said:

> "One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not by the Constitution to be impaired at all.

> This is not a question of degree or cause, but of encroaching, in any respect, on its obligation, dispensing with any part of its force."

And also in *United States ex rel. Hoffman vs. Quincy*, 4 Wallace, 535 (Justice Swayne):

> "When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the Act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that Act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist."

And also:

> "The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The Act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that Act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the Constitution a shadow and delusion."

In our brief on petition for certiorari we cite *Hubbel vs. Leonard*, 6 Fed. Supp., 145 (see brief, p. 16), and quote therefrom, wherein this Court in the case of *United States ex rel. Von Hoffman vs. Quincy*, supra, decided the controlling principles governing the decision in the present case. This Court in specific language above quoted held that any statute of a state impairing the obligation of a contract was invalid. This Court in that case among other things said:

"The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of the contract 'is the law which binds the parties to perform their agreement.' *Sturgis vs. Crowninshield*, 4 Wheat., 122. The prohibition has no reference to the degree of impairment."

In the case of *Sturgis vs. Crowninshield*, 4 Wheat., 122, this Court, by Chief Justice Marshall, said:

"A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it."

In the Quincy case this Court, in reversing the lower Court, directed the lower Court to issue a writ of mandamus compelling the levy and collection of the taxes to pay the bonds.

Another case by this Court we refer to as being squarely in point. We refer to the case of *Shapleigh vs. San Angelo*, 167 U. S., 648. In that case this Court held that an Act of the Legislature giving the voters a right to prevent the payment of the obligation of the bond, impaired the obligation of its contract. In the case at bar that is the precise question involved. Acts 169 and 28 above referred to, as construed by the Supreme Court of Arkansas, give the electors a right to destroy the obligation of the bond contract. We respectfully urge that when the Legislature of Arkansas by Act 169 repealed all laws governing the issue of bonds by special school districts, as it did in Section 196 of that Act (Acts 1931, page 584), and in the same Act authorized a procedure by which the electors were given power to prevent the payment of the bonds by voting to use all the revenues of the district for

maintaining the schools, except the tobacco taxes and severance taxes, it impaired the obligation of said contract. It is admitted (R. 83) by the respondent that it cannot pay these bonds because it needs the money to operate the schools. That of itself is sufficient under the decision in the last case cited to impair the bond contract as a matter of law.

We also refer, as sustaining our contention that the contract is impaired, to the following cases:

Tidal Oil Co. vs. Flannagan, 263 U. S., 444 (opinion by Chief Justice Taft).

W. B. Worthen Co. vs. Cavanaugh, 295 U. S., 56 (opinion by Justice Cardozo).

Provident Life & Trust Co. vs. Mercer County, 170 U. S., 593 (opinion by Justice Brewer).

W. B. Worthen Co. vs. Thomas, 292 U. S., 426 (opinion by Chief Justice Hughes).

United States vs. City of New Orleans, 98 U. S., 381.

In addition to the above cases we make the following observation on this subject:

The Constitution of the United States plainly states that no state shall pass any law impairing the obligation of contracts. It follows as a matter of law and logic binding upon all persons and all Courts that a state is without power to pass a law authorizing and empowering the voters of a school district to impair the obligation of a contract. A state being without such power necessarily has no power to authorize voters to do that which the state cannot itself do. The district in its answer and its counsel in their brief admit that the bonds are valid contracts; they admit owing the money. They admit this in their brief by offering to pay 42 cents on the dollar. They admit by their pleading and brief that these bonds were valid when issued. They admit by the evidence of their president (R. 157-8) that it was the intention of the district to pay the bonds and interest by the revenues of the district. They do not contend that prior to Act 169 and Act 28, elsewhere referred to in our brief, that there existed any power in the voters to impair the obligation

of the bond contracts. It follows from their admission that the state, by the Acts above named, has attempted to impose a condition upon the bonds which condition did not exist at the time they were issued and sold. In other words, said Acts of Arkansas authorized the voters to defeat the payment of the bonds by power which did not exist at the time the bonds were sold. It follows, therefore, that this case falls squarely within the decision of this Court in the San Angelo case elsewhere cited and quoted from. In that case this Court squarely held that giving the right to the voters which did not exist prior to the issuance of the bonds impaired the obligation of the contract.

In the final decree in the court below (R. 70-80) the District Judge as a part of said decree said (R. 77):

> "The Court declares the law to be that the plaintiff and intervenors have a prior lien on the real estate described in the respective mortgages or deeds of trust, and *all revenues of the district from whatever source derived.*"

Also (R. 76-77):

> "The Court finds that the improvements constructed on the real property described were erected for school purposes only, *and that it was not within the contemplation of the parties that said real estate or school buildings should be the sole security pledged for the bonded debt. * * * that it was contemplated and agreed that the bonded debt of the district should be paid out of its future tax revenues* in the manner provided for in said respective deeds of trust and that said pledge of revenues to secure the payment of said bonds is a prior and superior lien to all other liens or debts of the district * * * "

Also in said decree appears this (R. 79):

> "The Court reserves jurisdiction of this cause to enter such further or other orders as may be necessary to enforce the rights of the parties hereto and to direct a sale of the real property of said district, should it become necessary to sell the same."

In the findings of fact and conclusions of law connected with said final decree, and as a part thereof, the Court said (R. 69):

> "The Court is therefore of the opinion, after considering all of the evidence, that it would be unconscionable to declare this bond issue to be void, and the district is estopped to so claim."

It will be observed that the reservation of jurisdiction over the cause was for the sole purpose of enforcing the rights of the parties. The Court did not reserve any jurisdiction for the purpose of reducing the millage to be paid to the bond owners from nine mills to six mills. In fact, the Court's decree made afterwards allocates every penny of the eighteen mills to the maintenance of the schools. That is done in the very teeth of Amendment No. 11 of the Constitution of Arkansas. Amendment No. 11 (Pope's Digest, page 185) expressly states that the eighteen mills, when voted, are for three purposes: Maintenance of schools, construction of buildings, and payment of debts created to construct buildings.

In construing the meaning of this decree the Court should keep in mind the decision of the Supreme Court of Arkansas in *School District of Hartford vs. West Hartford School District*, 102 Ark. 261, 143 S. W. 895. That decision was rendered by the Supreme Court of Arkansas prior to the submission of Amendment No. 11 to the people of the state. In that Hartford case the Supreme Court of the State held that taxes voted for teachers' wages could be used for the purpose of constructing buildings, and that taxes voted for constructing buildings could be used to pay teachers' wages. That decision was well known to the people of Arkansas when they voted upon Amendment No. 11 at the election in October, 1926.

Both before and after the adoption of Amendment No. 11, the Constitution of Arkansas contained the same provisions regarding the use of millage taxes.

VIII

ESTOPPEL OF DISTRICT TO CLAIM DEFENSES SET UP IN ITS RESPONSE

We have shown that the response or counter-claim was filed in the lower Court (R. 83) more than a year after the Court had declared in the final decree that the bond issue of 1931 became effective prior to the effective date of Act 169. On that subject the final decree has this language (R. 65):

> "All of the above evidence conclusively shows this 1931 bond issue in the principal sum of $105,000.00 was issued prior to Act 169 of the Acts of the General Assembly of Arkansas for 1931 taking effect."

We also suggest that the respondent is not entitled to any consideration of the question of any excessiveness of the loan. On that subject the final decree has this language (R. 65):

> "It is contended by objecting intervenors and defendant that in the event said Act of 1931 was in effect that the bond issue is void because it would create an indebtedness of the district in excess of the legal restrictions contained in Act 169 of 1931. The evidence introduced in the case does not reflect that an addition of $105,000.00 to the bonded indebtedness of defendant school district would have exceeded the statutory limitation for indebtedness, as set forth in said Act 169 of 1931. It, therefore, appears that this bond issue took effect prior to the taking effect of Act 169 of the Acts of 1931 of the General Assembly of Arkansas; but, even if said bond issue did not take effect prior to the said statute becoming law, the bond issue is still not invalidated by this enactment."

It is our contention that the so-called answer, or response, or counter-claim of the district is in conflict with the decree of the District Court, being the final decree elsewhere referred to. It is well settled that a litigant in the course of the litigation will not be permitted to occupy inconsistent positions. This suggestion may be of little weight, but it does seem to us that the district in this case

should not be permitted to take the position that it does in its so-called counter-claim and its denial. It had no pleading in the case prior to the final decree.

We refer to the above findings and conclusions in the final decree for the reason that the record shows there was no appeal from that final decree. We therefore respectfully urge that when the Court of Appeals attempted to declare that the petitioner had no lien on the revenues from whatever source derived, said Court inadvertently overlooked the finding in said decree. We cannot see how the Court of Appeals could change the former decree when the respondent did not file its so-called motion and counter-claim for more than a year after the decree of June 28, 1938. In other words, the decree of the date last named became final, and the Court of Appeals was without power to change it, there being no appeal from it. It cannot be said that the attention of this Court was not called to that decree. See our brief on petition for writ of certiorari, page 2; and brief of *amicus curiae,* pages 40-41. The *amicus curiae* filed said brief claiming the same relief claimed by the petitioners and praying that the petition for certiorari should be granted. Hence this Court had that situation before it when the petition for certiorari was submitted. We do not refer to the above decree and the doctrine of estoppel for the purpose of proving our contention that the contract was impaired. We refer to said decree (R. 70) and its effects to show that respondent in a case involving the impairment of the bond contract makes its contentions embodied in its so-called defenses (R. 83).

After the final decree had been rendered, and on February 6, 1939, the directors not having paid the amounts due on the bonds, either of principal or interest, the petitioners filed a motion (R. 80) in the Court for the purpose of enforcing their rights embodied in the decree as above shown. Thereafter, the respondent on September 27, 1939 (R. 83), more than a year after the final decree of June 28, 1938, was entered, filed a so-called response or defense to the motion of the petitioners to enforce their rights. Respondent did not deny the debt nor the contract and has never denied it. Its chief contention, in that so-called response, is that it owes the debt but cannot

pay it because it needs the money for the maintenance of the schools. In Act 248 as amended it is made perfectly clear that in the issuance of bonds special school districts stand as a natural person. Properly considered, the so-called response of the respondent amounts to an assertion that its representations in the bond proceedings and in the bonds were absolutely false. Would a natural person be permitted to make any such defense? The respondent secured by these representations, which it now claims in effect are false, $160,000.00 for the construction of necessary buildings and the payment of debts, and yet it now attempts to contend that it is entitled to relief although it secured that money under false representations. We respectfully submit that the respondent is estopped, as indicated by the decision of the Honorable District Judge, from making any such contention.

IX

THE DECISION OF THE COURT OF APPEALS OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH OTHER DECISIONS OF THE SAME COURT.

It is unnecessary to argue this point at length. It is sufficient to cite the case of *Sovereign Camp W. O. W. vs. Gillespie*, 87 Fed. (2d), 944.

On this point we also cite the case of *Hubbell vs. Leonard*, 6 Fed. Supp., 145.

CONCLUSION

We are, of course, uninformed as to the reasons leading this great Court to deny the writ of certiorari. We believe that the contract has been impaired. By said Acts of the Legislature, as shown above, the debt will never be paid. It cannot be paid because, as the respondent says, it needs the money to operate the schools. On that subject we refer the Court to the evidence of Frank Eaton, the auditor appointed by the District Court to make an examination of the financial affairs of the district. That auditor (R. 114) gave it as his opinion that with proper bookkeeping and careful administration of the school affairs, and considering the revenues that were then coming in, the district would be able to operate the schools and yet pay very considerable sums on the debt for the construction of buildings.

It is our view that the petitioners are entitled, as a matter of absolute law, to have the petition for rehearing granted and to have the petition for certiorari granted, to the end that the great public questions involved may be brought out in the open, argued orally, re-examined by this Court, and decided as the Court finds that justice and right demand. The facts in the record show that the bond owners have ever been ready to make a reasonable disposition of the controversies and to refund the bonds. It is not necessary for the Court to rely upon that evidence or indication in reversing this cause. The case should be reversed and remanded, and the directors should under the direction of the District Court make such allocation of the funds as ought to be made. In that way the district, especially since it may obtain more than $10,000.00 a year from the revolving fund, will be enabled to keep the schools open and pay its honest debts. The whole matter in that event can be heard by the District Court and justice meted out to all concerned. The record shows (R. 105) that during the period covered by the evidence of Auditor Eaton the district received $53,000—approximately $10,000.00 per year from the revolving fund. The law authorizing State aid to needy school districts was

sustained by the Supreme Court of Arkansas in *State Board of Education vs. Aycock*, 198 Ark. 640, 130 S. W. (2d) 6.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals be, upon further consideration, reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We, James B. McDonough and J. W. House, counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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J. W. HOUSE,
Counsel for Petitioners.